DEPARTMENT OF STATE REVENUE

04-20130203.LOF

Letter of Findings: 04-20130203
Sales and Use Tax
For the Years 2009, 2010, and 2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Sales and Use Tax–Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 45 IAC 2.2-8-12.

Taxpayer protests the assessment of sales tax, claiming that the assessment is overstated.

STATEMENT OF FACTS

Taxpayer, an Indiana company, operates a gas station/convenience store in Indiana. Taxpayer sells gasoline and other items, including grocery items, deli food, automotive supplies, tobacco products, candy, fountain drinks, prepaid telephone calling cards, and lottery tickets.

The Indiana Department of Revenue ("Department") audited Taxpayer's business records for the 2009, 2010, and 2011 tax years. Pursuant to the audit, the Department found that Taxpayer did not maintain adequate sales records and source documents. The cash register receipts only listed the sales departments for the items and did not contain a detailed description of the items sold. Based on the best information available at the time of the audit, the Department imposed additional sales and use tax, penalty, and interest. The Department's audit used Taxpayer's income statements, tax returns, and purchase records as the best information available to determine the proper amount of sales tax. The Department determined that Taxpayer had under-reported its sales and made adjustments for additional taxable sales.

Taxpayer protests the assessment related to its additional taxable sales. An administrative hearing was held, and this Letter of Findings results. Additional facts will be provided as necessary.

I. Sales and Use Tax–Imposition.

DISCUSSION

The Department's audit imposed additional sales tax on the ground that Taxpayer failed to collect and/or remit the proper amount of sales tax on its convenience store sales. Taxpayer, to the contrary, argued that the Department's sales tax assessment related to the "additional taxable" convenience store sales is overstated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

The Department assessed Taxpayer sales tax. IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1 . . . or that is described in any other section of IC 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." The retail merchant collects "the tax as agent for the state." IC § 6-2.5-2-1(b). "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." 45 IAC 2.2-8-12(b).

Accordingly, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. Taxpayer is responsible for collecting and remitting the sales tax on its convenience store sales unless the customers have provided fully completed exemption certificates to Taxpayer or Taxpayer can provide information to substantiate that the transactions are transactions exempt from sales tax. When a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales. After reviewing the records Taxpayer made available, the Department determined that Taxpayer had not collected and remitted the proper amount of sales tax. Based on the information available, the Department made assessments of sales tax based upon "additional taxable" sales of convenient store items.

IC § 6-8.1-5-4(a) provides:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

IC § 6-8.1-5-1(b), in relevant part, further states "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the Department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest."

In this instance, the Department's audit used Taxpayer's purchase records from November through December 2009 as the best information available to determine the proper amount of sales tax regarding Taxpayer's convenience store sales because Taxpayer did not maintain adequate business records and source documents.

At the hearing, Taxpayer argued that the Department's audit assessment for "additional taxable sales" is overstated because the audit included receipts from Taxpayer's "bill pay system" in the adjustment made for "Phone Cards Add Com" account. Taxpayer asserts that the audit adjustment for difference between the Taxpayer's revenues on its statement income and its reported income on its sales tax returns is overstated. Lastly, Taxpayer maintains that the audit assessment understates the amount of Taxpayer's exempt grocery sales because the audit method included Taxpayer's cigarettes sales.

A. "Phone Card Add Com" Account.

Taxpayer asserted that the assessment related to the revenues recorded in its "Phone Card Add Com" revenue account is overstated. Taxpayer states that while its phone card sales were recorded in this account, Taxpayer maintains that it receipts from its "billing paying system" were also recorded in this account. Taxpayer maintains that the revenues from its "bill paying system" are not subject to sales tax. During the hearing, Taxpayer presented copies of its bank statements to support its protest. During the hearing, Taxpayer was asked to provide further documentation including contracts for its "bill paying system" and general ledger statements relating to the accounts for the "bill paying system.

However, Taxpayer failed to provide the additional documentation discussed. Therefore, Taxpayer has not provided sufficient documentation to support its assertions. Without documentation supporting Taxpayer's assertions, the Department cannot agree that the sales tax was assessed on the "Phone Card Add Com" account revenues in error. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proof to demonstrate that the proposed assessment is wrong.

Accordingly, Taxpayer's protest to the imposition of sales tax for "additional taxable sales" for the receipts recorded in its "Phone Cards Add Com" revenue account is respectfully denied.

B. "Difference Between Income Statement and Sales Tax Return."

Taxpayer asserts that the audit adjustment for the difference between the Taxpayer's revenues on its statement income and its reported income on its sales tax returns is overstated. Taxpayer maintains that the assessment includes in "additional taxable revenues" amounts that Taxpayer received as commissions on 1099s and "double assesses" sales tax on the income in the "Phone Card Add Com" account.

During the hearing, Taxpayer provided 1099s that would correspond to two categories of revenue listed in the adjustment. Upon review, Taxpayer's documentation demonstrates that the revenues represented on Form 1099s should not be included in the assessment for the "difference between income statement and sales tax return." Additionally, Taxpayer has demonstrated that the assessment includes in "additional taxable revenues" amounts in the income from the "Phone Card Add Com" account, which was separately assessed. Therefore, Taxpayer has met its burden of demonstrating that the assessment was incorrect as to these two items of revenue.

Accordingly, Taxpayer's protest to the imposition of sales tax resulting from the adjustment to the account for the "difference between income statement and sales tax return" is sustained as to the income represented on the Form 1099s and to the "double assessing" tax on the income from the "Phone Cards Add Com" account.

C. "Exemption Percentage."

Taxpayer maintains that the audit assessment understates the amount of Taxpayer's exempt grocery sales because the audit method included Taxpayer's cigarettes sales in calculation.

The Department found that Taxpayer did not maintain adequate sales records and source documents to properly determine the amount of taxable and exempt convenience sales that were reported. The cash register receipts only listed the sales departments for the items and did not contain a detailed description of the items sold. Therefore, the Department's audit used Taxpayer's purchase records from November through December 2009 as the best information available to determine the proper amount of taxable sales verses exempt sales. The Department's audit method examined items purchased and categorized the items as those that would be subject to tax when sold and those that would be exempt when sold. The Department then divided the number of exempt purchases by total purchases to derive at an exemption percentage.

Taxpayer claims that the audit's assessment is overstated because Taxpayer's cigarette purchases were included in the calculation to determine the exempt sales percentage. During the hearing, Taxpayer stated that it would provide documentation to support its assertion. However, Taxpayer failed to provide the documentation. Therefore, Taxpayer has not provided sufficient documentation to support its assertions. Without documentation supporting Taxpayer's assertions, the Department cannot agree that the sales tax assessment was in error. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proof to demonstrate that the proposed assessment is wrong.

Moreover, in this instance, Taxpayer did not maintain adequate records for the tax years at issue for the Department to determine the proper amount of sales tax by reviewing Taxpayer's source documentation of the sales. Pursuant to IC § 6-8.1-5-1(b), if the Department reasonably believes that Taxpayer has not reported the proper amount of tax due, the Department is required to make a proposed assessment on the basis of the best information available to the Department. After review, the Department is not convinced that its projection numbers are wrong. Cigarettes are properly subject to sales tax and, therefore, should not be removed from the calculation. While Taxpayer's method certainly results in different numbers, such numbers do not prove that the Department's numbers are wrong, as required by IC § 6-8.1-5-1(c). Taxpayer has not met the burden of proving the proposed assessments wrong.

Accordingly, Taxpayer's protest to the imposition of sales tax for "additional taxable sales" from the adjustments to the amount of exempt sales Taxpayer reported is respectfully denied.

FINDING

Taxpayer's protest to the imposition of sales tax resulting from the adjustment to account for the "difference between income statement and sales tax return" is sustained as to the income represented on the Form 1099s and to the "double assessing" tax on the income from the "Phone Cards Add Com" account. The remainder of Taxpayer's protest is respectfully denied.

Posted: 04/30/2014 by Legislative Services Agency
An html version of this document.